

actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not the purpose of the agency action is not considered to be prohibited taking under the ESA provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

The measures described below are non-discretionary, and must be undertaken by BOR so that they become binding conditions of any contracts or permits, as appropriate, for the exemption in section 7(o)(2) to apply. BOR has a continuing duty to regulate the activity covered by this incidental take statement. If BOR (1) fails to assume and implement the terms and conditions or (2) fails to require the San Luis and Panoche Water Districts to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, BOR and/or the San Luis and Panoche Water Districts must report the progress of the action and its impact on the species to NMFS as specified in the incidental take statement (50 CFR §402.14(i)(3)).

While some measures described below are expected and intended to avoid, minimize, or monitor the take of North American green sturgeon, the prohibitions against taking of endangered species in section 9 of the ESA do not automatically apply to threatened species such as the recently listed southern DPS of North American green sturgeon. However, NMFS is in the process of finalizing section 4(d) rules which will define and dictate the prohibitions against taking this threatened DPS. Therefore, NMFS advises BOR to implement the following reasonable and prudent measures for North American green sturgeon. Once the final 4(d) rule is adopted, these measures, with their implementing terms and conditions, will become nondiscretionary for North American green sturgeon.

A. Amount or Extent of Take

NMFS anticipates incidental take of Central Valley steelhead and North American green sturgeon in the San Joaquin River and south Delta as a result of increased selenium contamination in those waters through which they migrate and where juveniles of the species rear. Specifically, NMFS anticipates that juvenile and adult steelhead and green sturgeon may be adversely affected by increasing exposure to elevated levels of selenium which may impair the reproductive success, growth, and survival of these species in the wild.

NMFS cannot, using the best available information, specifically quantify the anticipated amount of incidental take of individual Central Valley steelhead and North American green sturgeon because of the variability and uncertainty associated with the response of listed species to the effects of the project, the varying population size of each species, annual variations in the timing of spawning and migration, and individual habitat use within the project area. However, it is possible to designate ecological surrogates for the extent of take anticipated to be caused by the project, and to monitor those surrogates to determine the level of take that is occurring. The most appropriate ecological surrogates for the extent of take caused by the project are the measured concentrations of selenium in Mud Slough and the San Joaquin River, and the

In order for NOAA Fisheries to be kept informed of actions minimizing or avoiding adverse effects or benefitting listed species or their habitats, NOAA Fisheries requests notification of the implementation of any conservation recommendations.

XI. REINITIATION OF CONSULTATION

This concludes formal consultation on the actions outlined in the request for consultation received from the BOR for the San Luis Water District and Panoche Water District Interim Renewal Contracts. As provided for in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of taking specified in any incidental take statement is exceeded, (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not previously considered, (3) the agency action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the biological opinion, or (4) a new species is listed or critical habitat is designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, formal consultation shall be reinitiated immediately.

BOR may request NMFS to confirm the conference opinion on proposed critical habitat for the Southern DPS of North American green sturgeon as a biological opinion if the proposed critical habitat designation becomes final. The request must be in writing. If NMFS reviews the proposed action and finds that there have been no significant changes to the action or in the information used during the conference, NMFS will confirm the conference opinion as a biological opinion for the project, and no further section 7 consultation will be necessary.

XII. LITERATURE CITED

Adams, P.B., C.B. Grimes, J.E. Hightower, S.T. Lindley, and M.L. Moser. 2002. Status review for North American green sturgeon, *Acipenser medirostris*. National Marine Fisheries Service. 58 pages.

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Alderdice, D.F., and F.P.J. Velsen. 1978. Relation between temperature and incubation time for eggs of Chinook salmon (*Oncorhynchus tshawytscha*). Journal of the Fisheries Research Board of Canada 35(1):69-75.

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